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Client Alert

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CMS Revises DMEPOS Standards

On August 27, 2010, the Centers for Medicare & Medicaid Services (CMS) released a Final Rule imposing revised program standards for suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS). These new standards expand existing participation requirements that DMEPOS suppliers must meet to establish and maintain billing privileges in the Medicare program. With limited exception, these provisions take effect on September 27, 2010.

The Final Rule includes the following clarifications, revisions and changes.

New Licensing Requirements

DMEPOS suppliers must meet all licensure requirements to provide a licensed service. CMS is placing the onus on individual suppliers to determine what licenses, if any, are required to provide a particular service in a particular state. CMS prohibits a DMEPOS supplier from contracting with a third party to actually provide the licensed service. This prohibition prevents entities from enrolling in Medicare and then subcontracting with third parties that are prohibited from participating in the Medicare program. CMS has clarified that this Final Rule does not affect a DMEPOS supplier's ability to contract with third parties for delivery of DMEPOS supplies to beneficiaries; however, the licensed professionals must be either part-time or full-time employees of the DMEPOS supplier.

Concerning oxygen supplies, if the DMEPOS supplier is located in a state that requires licensure for oxygen suppliers, then the DMEPOS supplier must obtain oxygen from a state-licensed oxygen supplier. (This standard does not apply to suppliers in states with no license requirements for oxygen suppliers.) Significantly, DMEPOS suppliers located in states that require licensure for oxygen suppliers must purchase their oxygen from a state licensed oxygen supplier. Therefore, even if that oxygen supplier is located in a state without oxygen licensure requirements, that out-of-state oxygen supplier must be licensed in the state where the DMEPOS supplier is located.

Prohibition on Direct Solicitation Clarified and Expanded

CMS reiterated that DMEPOS suppliers are prohibited from initiating any unsolicited, direct contact with Medicare beneficiaries unless:

1. the supplier has received written permission from the beneficiary to contact them concerning the furnishing of a Medicare-covered item that is to be rented or purchased

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2. the supplier has furnished a covered item to the beneficiary and is contacting the beneficiary to coordinate the delivery of the item
3. if the contact concerns a covered item other than one already furnished to the beneficiary, the supplier has furnished at least one covered item to the beneficiary within the previous 15 months prior to the contact.

CMS clarified that it considers the prohibition on direct solicitation to apply not only to solicitation by telephone, but also by "e-mail, instant messaging, or in-person contact without [the beneficiary's] consent for the purpose of marketing the DMEPOS supplier's health care products or services or both." CMS eliminated a proposed prohibition on "coercive internet advertising" and clarified that the revised standards do not restrict a supplier's ability to advertise products to the public or Medicare beneficiaries generally.

If a supplier receives a verbal order from a treating physician, the supplier may not contact the beneficiary unless the physician contacts the supplier on behalf of the beneficiary and with the beneficiary's knowledge, and then the supplier contacts the beneficiary to confirm or gather information needed to provide that particular covered item. For hospital issued physician orders, CMS noted that so long as the beneficiary has completed a consent form giving the hospital staff member written permission to share the beneficiary's information with a DMEPOS supplier for the purpose of initiating service, the hospital staff member can order the service on the beneficiary's behalf.

Expanded "Appropriate Site" Requirements

DMEPOS suppliers now must maintain a physical facility with a minimum of 200 square feet devoted to inventory, storage and patient records. State-licensed orthotic and prosthetic personnel providing custom fabricated orthotics or prosthetics in private practice are exempted from this requirement. Also, in recognition that many providers have already entered into long-term commercial leases, CMS has provided for a three-year transition period to phase in this requirement for existing providers. Prospective providers (including those with pending enrollment applications for new practice locations, reactivating billing privileges or changing practice locations) are expected to comply with the minimum square footage provision as of September 27, 2010.

The supplier's facility must be staffed during posted business hours and remain open and accessible (e.g., not in an area with restricted access) to the public at least 30 hours per week. CMS clarified that a supplier cannot combine the office hours of multiple locations to meet the 30-hour minimum requirement; therefore, each location must be open a minimum of 30 hours per week.

CMS also imposed new signage requirements for all supplier facilities. The supplier's name and business hours must be displayed on a "permanent, durable sign" at the main lobby entrance of the facility and posted in plain view of the public, including customers using wheelchairs, to enable beneficiaries to easily locate the business. CMS has stated that local zoning or signage prohibitions will not justify a waiver of this requirement and that appropriate sites must comply with the new signage requirements.

Suppliers must maintain a primary business phone that is operating at the appropriate site and listed under the name of the business locally or toll free for beneficiaries. Suppliers may not use cell phones, beepers or pagers as the primary business telephone number. Call forwarding and/or the exclusive use of answering machines and answering services as a supplier's primary telephone number during posted business hours is prohibited.

The supplier's location must contain adequate space for storing business records, including the supplier's delivery, maintenance, and beneficiary communication records. However, CMS explained that records may be stored off site, and multi-state suppliers may maintain central record storage locations. Suppliers must maintain ordering and referring documentation received from physicians or non-physician practitioners for seven years after the service or supply has been provided.

Suppliers may not share a physical practice location (i.e., the physical space where the supplier operates his or her business and meets with customers) with other Medicare providers and suppliers. However, CMS has created exceptions to this prohibition, allowing location sharing when the DMEPOS supplier is a separate unit located within a larger facility (i.e., in certain hospital, home health care agency and skilled nursing facility settings), or for physicians and non-physician practitioners, including physical and occupational therapists, operating as both DMEPOS suppliers and providers of professional services.

On-Site Visits

CMS and the National Supplier Clearinghouse (NSC) will conduct unannounced site visits during the supplier's posted hours of operation to ascertain supplier compliance with these requirements. If CMS or the NSC is unable to perform a site visit during normal operating hours, the NSC will revoke the supplier's Medicare billing privileges, subject to administrative appeal.

A DMEPOS supplier with multiple locations should consider maintaining individual tax identification numbers (TIN) for each of its locations. CMS has stated that while a supplier may enroll using a single TIN for multiple practice locations, if any location with that TIN has its billing privileges revoked by the NSC, CMS indicates that the privileges for all locations associated with that TIN will be revoked.

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